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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTHONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC. d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF ON THE MERITS FOR CARRIERS CONTAINER COUNCIL, INC., NEW YORK SHIPPING ASSOCIATION, INC., and PACIFIC MARITIME ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Powell v. National Football League ("Powell II"), 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) 28n

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BRIEF ON THE MERITS FOR CARRIERS CONTAINER COUNCIL, INC., NEW YORK SHIPPING ASSOCIATION, INC., AND PACIFIC MARITIME ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Introduction

The United States Court of Appeals for the District of Columbia Circuit ruled that the labor exemption immunizes from antitrust challenge a professional football league's multiemployer bargaining group's unilateral implementation of a uniform salary scale for developmental squad players that had been offered by the employer group during collective bargaining negotiations but

firmly rejected by the players' union. The court of appeals ruled that the labor exemption shields from antitrust liability this post-impasse implementation of employment terms in the labor market that is lawful collective bargaining activity under federal labor law, does not extend beyond the immediate bargaining unit, and has no undue impact on the product market. This rule of decision preserves the integrity and continued vitality of multi-employer bargaining, shelters from disruption long-standing rights established by well-settled principles of national labor law, and promotes the will of Congress by properly harmonizing the policies embodied in federal antitrust and federal labor legislation. The circuit court's definition of the scope of the labor exemption should be sustained.

Interest of the *Amici Curiae*

Carriers Container Council, Inc. ("CCC"), New York Shipping Association, Inc. ("NYSA"), and Pacific Maritime Association ("PMA") are non-profit membership associations which are the principal management, multiemployer collective bargaining representatives for employers of longshore workers in the United States. CCC and NYSA represent longshore employers on the Atlantic and Gulf Coasts, while PMA is the exclusive collective bargaining representative for longshore employers on the West Coast of the United States.

CCC is an association of the major United States and foreign vessel ocean carriers serving United States Atlantic and Gulf ports in connection with the transportation of goods by sea in international trade and commerce. CCC's 32 members during the past calendar year transported to and from United States Atlantic and Gulf ports more than 34.5 million tons of containerized cargo in the foreign trades of the United States. This cargo volume amounts to 82% of all containerized cargo loaded and unloaded at United States Atlantic and Gulf ports.

NYSA and PMA are associations of ocean carriers, marine terminal operators, stevedores, carrier agents, and other maritime concerns. NYSA's 71 members handle virtually all of the general cargo shipped through the Port of New York and New Jersey — the preeminent port on the East Coast of the United States. About 100 members of PMA are involved in the handling of the approximately 200 million revenue tons of cargo entering or exiting ports on the Nation's Pacific Coast in the States of California, Oregon, and Washington.

The mission of all three associations is to represent their members in collective bargaining with the labor unions that represent American dockworkers. CCC and NYSA negotiate and administer labor agreements reached with the International Longshoremen's Association, AFL-CIO ("ILA") — the labor organization that represents longshore workers employed on the Atlantic and Gulf Coasts. PMA negotiates and administers labor agreements reached with the International Longshoremen's and Warehousemen's Union ("ILWU"), the labor representative for longshore employees on the West Coast.

CCC is the lead negotiator in master contract negotiations involving Atlantic and Gulf ports from Maine to Texas. This master contract establishes the terms and conditions of employment for tens of thousands of American longshore workers on the Nation's Eastern and Southern shores. NYSA, while also participating with CCC in master contract negotiations, is the exclusive negotiator for the local terms and conditions of employment which apply in the bistate Port of New York and New Jersey. PMA is the exclusive employer bargaining representative for the negotiation and administration of labor contracts establishing the terms and conditions of employment for longshore employees on the West Coast.

Collective bargaining in the longshore industry has traditionally been conducted on a multiemployer basis. On the Atlantic and Gulf Coasts labor contracts establishing the terms and

conditions of employment for ILA-represented longshore workers have been two-tiered. CCC and NYSA, in conjunction with a dozen other multiemployer bargaining associations and major longshore employers, negotiate a master contract fixing wages, container royalties, hours, term of contract, and certain other master terms on a uniform, coastwide basis from Maine to Texas. Other employment issues, such as pension and welfare benefits, holidays, vacations, seniority, work rules, manning, safety, hiring rules, etc., which are referred to as local conditions, are negotiated by NYSA and other multiemployer bargaining associations on an individual-port basis. Historically, on the West Coast a single coastwide bargaining unit encompassing all ports has prevailed. PMA is the exclusive bargaining representative for longshore employers in this coastwide unit. On the Pacific Coast one uniform, multiemployer labor contract negotiated between PMA and the ILWU prescribes all of the terms and conditions of employment as well as a complete system of fringe benefits for ILWU-represented longshore employees. The CCC, NYSA, and PMA multiemployer bargaining units each fixes the employment terms for thousands of American dockworkers employed by hundreds of different employers.

Along with the labor unions with which they bargain CCC, NYSA, PMA, and other multiemployer bargaining associations throughout the United States are the intended beneficiaries of the protections afforded by the labor exemption to the antitrust laws in the context of multiemployer collective bargaining. The *amici* joining in this brief thus have a vital and compelling interest in the issues now before the Court concerning the appropriate parameters of the labor exemption.[1] There is no indication in either the lower courts' decisions in this case or in the pleadings and briefs submitted to this Court that the rule of decision in this case will be confined to collective bargaining in professional sports. CCC's, NYSA's, and PMA's participation as *amici*

[1] All parties have consented to the filing of this *amici curiae* brief. Their written consents have been lodged with the Clerk of the Court.

curiae will assure that this Court's determination of the scope of the labor exemption will not be unduly influenced by the peculiar characteristics of multiemployer bargaining in specialized industries, like professional sports, but will be informed by a consideration of the features of more traditional multiemployer bargaining units in the Nation's industrial sector.

Summary of Argument

Federal labor legislation effectuates the national policy of promoting the resolution of labor disputes through a process of private collective bargaining. Congress has chosen a labor law scheme that gets labor and management to the bargaining table and then leaves them alone to work out their differences, allowing each to resort to whatever economic pressure devices are available. This national labor policy applies to both single employer and multiemployer collective bargaining units without distinction.

To promote Congress's deliberate choice of negotiation, not litigation, for the settlement of collective bargaining disputes, federal antitrust law regulation of collective bargaining has been displaced by a labor exemption derived from both the express provisions of federal labor statutes as well as from the logical, nonstatutory extension of the national policy embodied in the entire regime of federal labor law. The statutory exemption prescribed in the Clayton and Norris-LaGuardia Acts shields from antitrust challenge certain protected activities engaged in by persons participating or interested in labor disputes, which would include not only labor unions but also employers. The explicit language of both of these statutes includes in the list of protected activities exempt from the antitrust laws the very collective bargaining activities challenged in this case — the post-impasse, unilateral implementation of employment terms by a multiemployer collective bargaining group.

The inclusion in the statutory exemption of conduct ordinarily engaged in by multiemployer groups to resolve collective bargaining and other labor disputes also defines the contours of the nonstatutory labor exemption — the necessary tool for the proper accommodation between the congressional policy favoring collective bargaining and the congressional policy favoring free competition in business markets.

The nonstatutory labor exemption extends not only to the collective bargaining agreement itself but also to legitimate unilateral multiemployer collective bargaining activities required or permitted by federal labor law. The consent of unit employees or their union representative is not an essential prerequisite for application of the labor exemption. Both multiemployer bargaining and the employer-employee relationship are consensual in nature. By agreeing to a multiemployer bargaining format the employees and their union representative agree to accept whatever rights and privileges federal labor law bestows on the multiemployer group, including the right to implement employment terms unilaterally after impasse. These post-impasse employment terms are not unilaterally imposed, since they are subject to the employees' acceptance. By continuing to work, the employees and their union manifest their acceptance of the employers' offer, and a contract results that fixes the terms of employment on an interim basis until the collective bargaining process produces a final agreement. In a strike-free or lockout-free environment a contract is always in place, signifying the employees' and their union's consent to the post-impasse employment terms offered by their employers.

Collective bargaining activities of multiemployer groups that are lawful under federal labor law and that affect only employment conditions in the immediate bargaining unit are exempt under both the statutory and nonstatutory labor exemptions from challenge under the antitrust laws at all stages of the collective bargaining process. This rule of law properly promotes national

labor policy without frustrating national antitrust policy, since employment conditions involving only the immediate bargaining unit do not affect the employers' business market, the area of antitrust concern. Allowing antitrust law challenges to multiemployer collective bargaining activities would interfere with the rights and privileges bestowed by national labor law, fragment multiemployer units, promote union intransigence in the collective bargaining process, and destabilize the bargaining authority of both union and multiemployer bargaining representatives. Inviting antitrust laws to the bargaining table would sound the death knell for multiemployer bargaining in the United States.

ARGUMENT

Multiemployer Collective Bargaining Activities Lawful Under Federal Labor Law And Affecting Only The Immediate Bargaining Unit's Employment Relationship Are Shielded From Antitrust Law By The Labor Exemption

Petitioners on behalf of that segment of the professional football players' bargaining unit composed of practice squad players urge a drastic pruning of the labor exemption that could expose to liability under the antitrust laws multiemployer collective bargaining activities that are lawful under, and may sometimes be compelled by, federal labor law.[2] The plain and explicit terms both of the labor exemption contained in the Clayton and Norris-LaGuardia Acts and of the so called "nonstatutory labor exemption" emanating from those statutory schemes as well as from the subsequently enacted Wagner and Taft-Hartley Acts

[2] The United States, as *amicus* in support of petitioners, would not go as far as petitioners in limiting the labor exemption. However, its proposal to end the exemption at or just after impasse would also have severe adverse consequences for multiemployer bargaining groups.

reveal a deliberate and unambiguous congressional design favoring federal labor law as the exclusive regulatory calculus for adjudging the legality of collective bargaining activities and discouraging the interjection of antitrust law by either side into the collective bargaining process.

Antitrust Policy

From the enactment of the Nation's first antitrust statute, the Sherman Act of 1890, it was evident that collective bargaining activities do not fall within the target area of antitrust concern.[3] Congress sought to stamp out only restraints "upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940) (footnote omitted). The Sherman Act is a "consumer welfare prescription," *see Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979),[4] that sets its sights on competitive conditions in business markets, not on the terms and conditions of employment in labor markets. *See* Archibald Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. PA. L. REV. 252, 255 (1955) ("[T]he antitrust laws are not concerned with competition among laborers or with bargains over the price or supply of labor — its compensation or hours of service or the selection and tenure of employees."). "[A] union, in its capacity as bargaining representative, will frequently not be part of the class the

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[3] The antitrust challenge in this case is predicated upon the proscriptions of § 1 of the Sherman Act, which states simply that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994).

[4] Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L. J. 19, 45 (1986) ("Congress in 1890 was hostile toward giant trusts and corporations [, but] [t]his hostility, however, was not primarily directed at the 'aggregations of capital' because of their conduct as employers; rather it was in their capacity as exploiters of the consumer and small competitors that they incurred the brunt of congressional wrath.").

Sherman Act was designed to protect, especially in disputes with employers with whom it bargains." *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 540 (1983). Congress established a separate body of national labor law to regulate activities within labor markets. *See id.* at 539-40.

Labor Policy

Federal labor legislation is designed to effectuate a national policy of governmental neutrality and equality of bargaining power in the collective bargaining arena. The 1935 National Labor Relations Act ("Wagner Act") as amended by the 1947 Labor-Management Relations Act ("Taft-Hartley Act") (hereinafter collectively referred to as the "NLRA") establishes a comprehensive array of labor law standards to govern union and employer conduct and "deliberately plac[es] the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body [the National Labor Relations Board ("NLRB")] rather than the federalized judicial system." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288 (1971).[5]

In collective bargaining federal labor law makes no effort to dictate the substantive terms of the parties' agreement. Instead,

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[5] The Taft-Hartley Act removed the disparities of the earlier Wagner Act, which had held employers, but not unions, accountable for unfair labor practices. *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 703 n.7 (8th Cir. 1992) ("[W]hile the stated purpose of the Wagner Act . . . was intended to promote unionization, the Taft-Hartley Act attempted to restore some balance to labor management relations"); *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 131 (7th Cir. 1989) ("[T]he Taft-Hartley Act . . . sought to correct what had come to be thought of as the Wagner Act's excessive tilt towards unions"); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983) ("The Wagner Act was of course intended to promote unionization . . . . Taft-Hartley applied some brakes, so that the balance of power between companies and unions would not shift wholly to the union side").

it establishes the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C.§158(d) (1994). The failure to bargain in good faith by either side at any stage of the negotiations, even after impasse, is an unfair labor practice, *see* 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1994), but the failure to agree is not, *see* 29 U.S.C. § 158(d) (1994).

This legislated neutrality reflects the congressional policy of governmental non-interference in the collective bargaining process — get the parties to the table but then leave them alone to work out their differences, allowing each side to resort to whatever economic pressure devices are available. *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488-89 (1960); *see also Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 141 (1976); *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 678 (1981). Negotiation, not litigation, is Congress's chosen instrument for the settlement of collective bargaining disputes. *Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 211 (1964).

The NLRA carefully calibrates the rights and duties of both parties to the bargaining process to effectuate the second congressional objective of a rough balance of power. Employees may strike, *see NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962); 29 U.S.C. §163 (1994), but employers also have the right to lock out their workers, *see American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 310-11 (1965). After the prior labor contract expires and while negotiations are in progress, an employer may not undermine the union's bargaining authority by unilaterally changing any of the terms and conditions of employment in the expired contract that qualify as mandatory subjects of bargaining, *see NLRB v. Katz,* 369 U.S. 736, 743 (1962), but when an impasse occurs, an employer then has two choices: either lock out the employees or offer them new terms of

employment so long as these new terms are "reasonably comprehended within his pre-impasse proposals," *see, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988).[6] Generally, economic strikers may not be fired and must be rehired when the strike ends, *see NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), subject, however, to the employer's business necessity to hire permanent replacements, *see NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). In administering the rights and duties of the bargaining parties, the NLRB's role under the NLRA is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

National labor law makes no distinction between single employer and multiemployer collective bargaining rights and obligations. Multiemployer bargaining is protected and encouraged under the Norris-LaGuardia Act, which precludes any injunction prohibiting employers from joining or remaining members of employer organizations. 29 U.S.C. §104(b) (1994). In 1947, Congress refused to restrict multiemployer bargaining because it "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local 449 ("Buffalo Linen")*, 353 U.S. 87, 95 (1957).[7]

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[6] While these new terms are unilaterally formulated by the employer, they are not unilaterally imposed, since these new terms are not binding until accepted by the employees, who, of course, are free to reject the proffered terms by refusing to work. *See infra* pp. 21-22.

[7] Multiemployer bargaining enables employers to form a common front in collective bargaining negotiations, eliminate competitive disadvantages that would flow from the absence of uniform employment terms, and engage in concerted lockouts both to advance their common collective bargaining goals and to defend against union whipsawing. *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409-10 & n.3 (1982).

Labor Exemption

Reconciliation of conflicts that might arise between federal antitrust and federal labor policies required the development of statutory and "nonstatutory" labor exemptions to the antitrust laws.

1. **Statutory Exemption**

Both the Clayton Act and the Norris-LaGuardia Act are the source of the statutory exemption, *see H. A. Artists & Associates, Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 715 (1981) (citing *United States v. Hutcheson*, 312 U.S. 219, 236 (1941)),[8] and both are part of the fabric of national labor legislation upon which rests the development of the "nonstatutory" exemption as well — a fact petitioners readily admit. *See* Petitioners' Brief at 18.

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[8] Sections 6 and 20 of the Clayton Act, *see* 15 U.S.C. § 17 (1994); 29 U.S.C. § 52 (1994), constitute the primordial version of the statutory labor exemption. The Court in *Hutcheson* recounted that "[t]his statute was the fruit of unceasing agitation, which extended over more than twenty years, and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Hutcheson*, 312 U.S. at 229 (quoting *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484 (1921)(Brandeis, J., dissenting)). Section 6 of the Clayton Act declared that "[t]he labor of a human being is not a commodity or article of commerce" within the meaning of the antitrust laws and disallowed the use of the antitrust laws to outlaw labor unions. Section 20 of the Clayton Act removed certain legitimate activities in labor disputes from interdiction by the antitrust laws and "also relieved such practices of all illegal taint by the catch-all provision, 'nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'" *Id.* at 230. Restrictive interpretations of the scope of this first labor exemption, *see, e.g., Duplex Printing, supra; Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37 (1927), sparked further discord that eventually led to the adoption in 1932 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994), which expanded the statutory exemption by proscribing the issuance of injunctions in virtually all labor disputes. *Hutcheson*, 312 U.S. at 230-31.

A misconception has arisen that the statutory labor exemption is a shield for labor unions alone. *See* Petitioners' Brief at 19; *Amicus* Brief For United States at 12; *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1048 (D.C. Cir. 1995); *id.* at 1062 (Wald, J., dissenting). While it is true that this Court has invoked the statutory labor exemption to immunize from antitrust liability unilateral union activities involving or growing out of a labor dispute, *see H. A. Artists*, 451 U.S. at 714-15; *Hutcheson*, 312 U.S. at 232, and has refused to extend the statutory exemption to "concerted action or agreements between unions and nonlabor parties," *see Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975), the Court has never ruled that the statutory exemption is exclusively a unions' preserve simply because it has never until this case confronted the question whether unilateral multiemployer activities involving or growing out of a labor dispute enjoy the safeguards of the statutory labor exemption.[9]

[9] The comment in *H. A. Artists* that "a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur," *see* 451 U.S. at 717 n.20 (citing *Los Angeles Meat Drivers Local 626 v. United States*, 371 U.S. 94 (1962), and *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143 (1942)), does not answer the question. The comment when read in context footnoted the proposition in the main text of the opinion that the threshold question in any statutory exemption case is whether the challenged conduct involves any combination between union and nonlabor groups — a debilitating condition that would cause the statutory exemption to evaporate. The comment has no bearing on the question whether unilateral multiemployer activities arising out of collective bargaining or other labor disputes enjoy the protections of the statutory exemption. The comment simply reaffirms the settled principle that the statutory exemption does not apply to bilateral activities involving concerted actions or agreements and combinations between unions and nonlabor groups. *Connell*, 421 U.S. at 622; *H. A. Artists*, 451 U.S. at 715 (citing *Hutcheson*, 312 U.S. at 232). In *H. A. Artists* the statutory exemption applied because those theatrical agents with whom the union combined were found not to constitute a nonlabor group because of the economic interrelationship that affected legitimate union interests. *Id.* at 721-22. The same result was not forthcoming in the two cases cited in the *H. A. Artists* footnote. In *Meat Drivers* a union admitted to membership

The Clayton and the Norris-LaGuardia Acts do not foreclose employers from the statutory labor exemption. Indeed, they expressly embrace unilateral multiemployer activities involving collective bargaining or other labor disputes. The protected activities under these labor statutes are not those of labor unions alone but of persons participating or interested in a labor dispute, whom the Clayton Act broadly defines to include foreign and domestic "corporations and associations," *see* 29 U.S.C. § 53 (1994), and whom the Norris-LaGuardia Act specifically defines to be a person or association "engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is *a member*, officer, or agent *of any association composed* in whole or in part *of employers* or employees engaged in such industry, trade, craft, or occupation," *see* 29 U.S.C. § 113(b) (1994) (emphasis added).

The list of protected activities in both statutes contains conduct that employers in a multiemployer bargaining unit customarily engage in "singly or in concert" in connection with collective bargaining or other labor disputes: "terminating any relation of employment," "ceasing . . . to employ any party to such dispute," "[c]easing or refusing . . . to remain in any relation of employment," "[b]ecoming or remaining a member of . . . any employer organization," "[p]aying or giving to, or withholding from, any person participating or interested in such labor dispute . . . moneys or things of value," "[g]iving publicity to the existence of, or the facts involved in, any labor dispute,"

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and then combined with a nonlabor group of self-employed grease peddlers to suppress and eliminate the peddlers' competitors. In *Columbia River Packers* a group of commercial fishermen calling themselves a "union" combined to fix the terms of contracts for the sale of fish so that any purchaser would have to buy exclusively from members of the bogus "union." In both cases the statutory exemption was unavailing to excuse from antitrust liability an anticompetitive combination involving nonlabor participants and having nothing to do with any labor dispute or legitimate union objective.

"[a]ssembling peaceably to act or to organize to act in promotion of their interests in a labor dispute," and "[a]greeing with other persons to do or not to do any of the acts heretofore specified." *See* 29 U.S.C. §§ 52, 104 (1994). Section 5 of the Norris-LaGuardia Act, 29 U.S.C. § 105 (1994), makes it clear that persons participating or interested in a labor dispute do not constitute or engage in an unlawful combination or conspiracy because of their concerted recourse to these protected activities.

Lockouts by employers in a multiemployer unit are cessations or refusals to employ or remain in an employment relationship. Permanent replacement of economic strikers by members of a multiemployer group is a termination of an employment relationship. Management caucuses among members of a multiemployer group are assemblies to promote their common interests in a labor dispute. Formulating and presenting multiemployer bargaining positions — indeed, the unilateral post-impasse implementation of terms and conditions of employment, like the fixed wage scale for developmental squad members at issue in this case — are agreements to pay or withhold monies or things of value from persons participating or interested in a labor dispute as well as agreements among employers to act in promotion of their common interests in a labor dispute.

The unilateral employer activity challenged in this case falls within the statutory exemption formed by the interplay of the Clayton and Norris-LaGuardia Acts. Certainly, the express terms of these statutes do not warrant its exclusion, since they bar any court from enjoining this protected activity. "[T]hat which on the equity side of the court is allowable conduct" hardly qualifies as the basis for the imposition of onerous treble damages on the law side of the court. *Cf. Hutcheson*, 312 U.S. at 235 (drawing the same conclusion when the anomaly involves a court's equity and criminal jurisdictions). "That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a

series of enactments touching one of the most sensitive national problems." *Id.* at 235. More importantly, the Clayton Act itself expressly "removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." *Id.* at 236.

All that can be said to justify the exclusion of employers' collective bargaining activities from the protections of the statutory exemption is that labor unions, not management, provided the lobbying catalyst that sparked the exemption's adoption. *See, e.g.,* James M. Altman, *Antitrust: A New Tool For Organized Labor?,* 131 U. PA. L. REV. 127, 142-47 (1982). This is hardly a revealing diagnostic tool of statutory construction. The proponent of legislation is not necessarily its sole beneficiary. It may be true that Congress's immediate objective was to prevent misuse of the antitrust laws to disband labor unions or suppress their legitimate activities. But the plain language of the statutory exemption reveals a much broader congressional policy concerning the appropriate role of antitrust law in regulating relations between workers and their employers that transcends the exemption's immediate goal.

The declared public policy of the Norris-LaGuardia Act[10] confirmed Justice Brandeis's prior finding that the statutory exemption enacted in the Clayton Act "was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Printing,* 254 U.S. at 484 (Brandeis, J., dissenting). The inclusion in the list of protected activities contained both in § 20 of the Clayton Act, 29 U.S.C. § 52 (1994), and in § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1994), of conduct ordinarily engaged in by employers, whether singly or in concert, to resolve collective bargaining and

[10] This policy recognizes the need to balance the bargaining rights of employers and employees by bestowing upon individual workers the same rights enjoyed by employers to associate, to designate bargaining representatives, and to engage in other concerted activities for the purpose of collective bargaining or other mutual protection. 29 U.S.C. § 102 (1994).

other labor disputes demonstrates Congress's deliberate choice to remove from regulation under the antitrust laws legitimate actions taken by employers in disputes with their workers.[11] The statutory exemption embodied the judgment of Congress that

[11] The Government's suggestion, *see Amicus* Brief of United States at 12 n.4, echoed by the petitioners, *see* Petitioners' Brief at 24-25, 30, that *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926), and *Radovich v. National Football League*, 352 U.S. 445 (1957), conclusively bar employers' access to the protections of the statutory exemption reads too much into these authorities. There were no labor considerations at work in either case: no collective bargaining relationship, no multiemployer bargaining association, no labor union, no labor dispute. *Radovich* provides no insight into the parameters of the statutory labor exemption, which was not at issue because of the absence of any of the protected activities that would warrant its invocation. The lessons of *Radovich* are purely of an antitrust nature: the special exemption enjoyed by professional baseball does not extend to the business of professional football, *see* 352 U.S. at 451, and the blacklisting of players from a rival league for the purpose of monopolizing that business market by destroying the competing league is actionable under the antitrust laws, *see* 352 U.S. at 448-49, 453-54. The issue in *Anderson* concerned the definition of commerce for the purpose of triggering application of the antitrust laws. Since the challenged restraint, which did not arise in a collective bargaining context, involved the employment of seamen on ships that are instrumentalities of interstate and foreign commerce, the effect on commerce in the *Anderson* Court's view was so direct and primary as to rule out any suggestion that the antitrust laws did not apply. 272 U.S. at 364-65. Because of this fixation on the commerce issue, the Court was able to rule out any need to consider other case law then extant involving labor considerations because those cases arose in local industries having only an indirect, incidental, and secondary effect on commerce. 272 U.S. at 363-64. Although the shipowners raised the issue, whether regulation of employment falls within the ambit of the antitrust laws, the *Anderson* Court considered that question to be irrelevant. 272 U.S. at 363. As a result, the Court never examined the provisions of §§ 6 and 20 of the Clayton Act, the only statutory labor exemption then in existence, since *Anderson* arose prior to the enactment of the Norris-LaGuardia Act. Recourse to *Anderson* is dangerously misleading and heedless of Justice Frankfurter's admonition that "[t]here is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict." *Hutcheson*, 312 U.S. at 236.

labor disputes are an "area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts." *Hutcheson*, 312 U.S. at 231 (citation omitted).

2. **"Nonstatutory Exemption"**

Implicit in the scope and comprehensiveness of the legislative scheme of federal labor law is a "nonstatutory labor exemption" that is necessary for "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975). This "nonstatutory labor exemption" augments the statutory labor exemption by extending the exemptive shield to concerted actions and agreements between unions and nonlabor groups. *Id.* at 622-23.[12]

An agreement between employers and employees concerning terms and conditions of employment applicable to the immediate bargaining unit's labor market that has only an incidental, not a direct, effect on the business market that is no broader than necessary to effectuate the agreement's legitimate labor objectives is entitled to the protections of the "nonstatutory exemption." *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689-91 (1965). The exemption is forfeited, however, when the parties include in their agreement: (1) monopolistic provisions controlling the business market, *see Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 808 (1945); (2) requirements for the union to impose the same contractual labor conditions on other bargaining units, *see United Mine Workers v. Pennington*, 381

[12] We refer to the "nonstatutory labor exemption" as "so-called" and place the term in quotation marks in order to refer to it not as a separate exemption but rather the logical extension of congressional will embodied in the entire regime of national labor law, including the Clayton, Norris-LaGuardia, Wagner, and Taft-Hartley Acts, to keep the antitrust laws out of the collective bargaining process.

U.S. 657, 664-65 (1965); or (3) acquiescence by the employer to the union's demand for the boycotting of nonunion firms, which has a direct and immediate anticompetitive impact on the business market by excluding competitors from a portion of that market, *see Connell,* 421 U.S. at 623-25.

Until this case this Court's labor exemption jurisprudence had never explored the appropriate parameters of the exemption when the antitrust assault is mounted by one of the collective bargaining parties against the other's negotiating activities. Neither the petitioners nor any of the *amici* supporting them, including the United States, advocates unfettered application of the antitrust laws to disputes arising within the collective bargaining theater. They all agree that the exemption should play a role but insist that it leave the stage before the final act and even then disagree among themselves as to the proper time for its departure. Petitioners would banish the exemption as soon as the prior collective bargaining agreement expires. *See* Petitioners' Brief at 45. The United States would keep it on the stage at least until an impasse has been reached, and perhaps even longer. *See Amicus* Brief of United States at 17, 18 n.5.

3. No "Consent" Requirement For Labor Exemption

The underlying premise for all of these putative temporal limitations on the application of the exemption is the invalid notion that the *sine qua non* for the exemption is the employees' consent as manifested in their union's subscription to a collective bargaining agreement. Consent is not an essential prerequisite for application of the exemption; all that is required is that the activity be part of the collective bargaining process and not violate the labor laws. Even if consent were necessary, it is always present in a strike-free collective bargaining environment.

The only authority proffered by the petitioners and their *amici* colleagues for their putative consent formulation is this Court's prior acknowledgment that agreements between

employers and employees may under appropriate circumstances be safeguarded from antitrust challenge by the "nonstatutory exemption." *Connell*, 421 U.S. at 622; *Jewel Tea*, 381 U.S. at 688-91. It does not follow, however, that the inclusion of the agreement itself within the exemption operates to exclude all other collective bargaining activities or to insinuate by inference a consent element into the exemption formula. While it is true that this Court has ruled that labor-management agreements may qualify for the "nonstatutory exemption," it has never indicated that the union's consent is the qualifying factor or that the exemption is confined only to the collective bargaining agreement itself.[13]

Consent is hardly a worthy candidate for an antitrust exemption recipe, for it is usually consent that triggers antitrust concerns. Indeed, Sherman Act § 1 outlaws anticompetitive restraints that are the product of agreements or other concerted undertakings. 15 U.S.C. § 1 (1994). It is a cardinal principle of antitrust law that the consent of one party to an anticompetitive contract does not preclude that party from seeking antitrust remedies from the other contracting parties. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968) (*in pari delicto* doctrine is not a valid defense to an antitrust action). Moreover, consent was never considered a relevant factor in Congress's adoption of the statutory labor exemption. A consent requirement, therefore, is conceptually incompatible with fundamental antitrust principles.

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[13] Congress itself has not considered union consent to be a necessary ingredient for a labor exemption. In a related context Congress adopted a labor exemption from federal shipping law not only for the collective bargaining agreement itself but also for "agreement[s] preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group." *See* 46 U.S.C. app. § 1702 (16) (1988) (defining what maritime labor agreements are entitled to the labor exemption from federal shipping law prescribed in 46 U.S.C. app. § 1704(e) (1988)); *see also Council of N. Atlantic Shipping Ass'ns v. FMC*, 672 F.2d 171 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982).

From a labor law standpoint, the putative consent requirement is a red herring. Multiemployer bargaining is consensual and cannot take place without the assent of the union. *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982); *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *NLRB v. Hart*, 453 F.2d 215, 217 (9th Cir. 1971), *cert. denied*, 409 U.S. 844 (1972). By agreeing to a multiemployer bargaining format the employees' union representative agrees to accept whatever rights federal labor law bestows upon the multiemployer group, including the employers' right to engage in any bargaining activities permissible under that statutory scheme.

The employer-employee relationship itself is also quintessentially contractual in nature. When a multiemployer collective bargaining agreement is in effect, the terms of that agreement define the contractual relationship between the employers and their workers. When that agreement expires, the employees have several rights: they can strike, they can go to work without a collective bargaining agreement, they can seek to decertify their union, or they can petition to clarify the bargaining unit. If they decide to work, their performance of services is a tacit acceptance of the terms of employment unilaterally offered by the employers. While negotiations are in progress and no impasse has occurred, the employers' right to fix the terms of employment is restricted by the obligation imposed by federal labor law to continue in effect the terms of the expired contract that relate to mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Impasse may bring that interim contractual arrangement to an end, but it does not alter the basic structure of the contractual relationship. The employers are then free to alter their offer subject only to the federal labor law requirement that the changes in the *status quo* are reasonably comprehended within the employers' pre-impasse proposals. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n. 5 (1988). Whether the new offer is accepted depends entirely upon the employees. By continuing to

work, the employees and their union representative manifest their acceptance of the employers' offer, and a contract results that fixes the terms of employment on an interim basis until the collective bargaining process produces a final agreement. *United Paperworkers Int'l Union v. International Paper Co.*, 920 F.2d 852, 855-59 (11th Cir. 1991); *United Paperworkers Int'l Union v. Wells Badger Indus., Inc.*, 835 F.2d 701, 704 (7th Cir. 1987).[14]

In a strike-free or lockout-free environment a contract is always in place. To suggest otherwise would require a repudiation of settled principles of contract law that would defy reality and introduce into the labor exemption equation an element that has no basis in law or in fact. Once the artificiality of the proposed consent requirement is exposed, the "nonstatutory" exemption analysis can be properly focused on the harmonization of the underlying policies of federal labor law and federal antitrust law. A

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[14] In this case all of the practice squad players comprising the petitioner class signed individual written contracts agreeing to the uniform salary scale, which were to be superseded, of course, by new individually negotiated contracts for any practice players called up to regular team status. The players' union took no strike action presumably because of the antipathy of star players and other regular team members for their practice squad brethren, *see* Petitioners Brief at 42, not an unusual occurrence in large heterogeneous bargaining units composed of workers with divergent interests. This lack of intraunion solidarity hardly justifies enhancing the bargaining strength of the practice players' segment of the bargaining unit by giving them an antitrust weapon. The practice players' lack of bargaining leverage is due not to the lack of antitrust remedies but rather to a lack of support within their own union. Their remedy lies within their own union or in the labor laws, not in the antitrust laws. Their labor law remedies are not limited to decertification, as petitioners suggest, *see id.* at 42. The practice players may file unfair labor practice charges with the NLRB if the employers fail to bargain in good faith after impasse. These players may also petition the NLRB for unit clarification or readjustment to establish their own separate unit, where they would not be at the mercy of unsympathetic union members. *See, e.g., Lakeshore Manor, Inc.*, 225 N.L.R.B. 908 (1976); NLRB RULES & REGULATIONS, 29 C.F.R. §§ 102.60(b), 102.61(d), 102.63(b) (1995); NLRB CASEHANDLING MANUAL, pt. 2, at ¶¶ 11480-11498 (1989).

proper accommodation of these policies implicates the very same considerations that informed the statutory exemption analysis.

Labor law provides both the rules and the remedies for regulation of the collective bargaining process. These labor law devices establish the groundrules for the negotiating process but do not interfere with the bargaining freedom of both employers and employees. To allow employees during the course of collective bargaining to resort to the antitrust laws would enable federal courts to impinge upon employers' bargaining freedom by passing judgment under the antitrust laws on the reasonableness of their substantive bargaining proposals,[15] thus subverting the fundamental tenets of national labor policy — governmental neutrality and equality of bargaining power. The courts, not the parties, would dictate the substantive terms of the bargain, and the disparity of treatment would upset the balance of bargaining power by subjecting only employers to the risk of treble damage penalties because a federal court might disagree with bargaining proposals they had every right under federal labor law to pursue. This intrusion of antitrust law into the collective bargaining process would not advance any genuine antitrust interests, since collective bargaining on employment conditions in the immediate bargaining unit does not unduly affect the employers' business market, the area of antitrust law concern. Every element warranting application of the "nonstatutory" labor exemption is present in this case.

Longshore Multiemployer Bargaining

Multiemployer bargaining has been the traditional format for labor relations and negotiations in the longshore industry. *NLRB v. Truck Drivers Local 449 ("Buffalo Linen")*, 353 U.S. 87, 94 (1957). Ships calling at United States ports are owned and operated by numerous United States and foreign ocean carriers. In

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[15] In most industries most if not all multiemployer activities could be considered horizontal restraints and therefore *per se* violations of the antitrust laws. *See infra* p. 25.

each United States port there are many stevedoring companies and terminal operators. In every port there is a pool of longshore employees who work for different stevedoring companies and terminal operators day-to-day, handling the vessels of various ocean carriers calling at the port. The longshore industry is highly competitive. Of the 50 or so stevedores in operation in the Port of New York in 1956, *see New York Shipping Ass'n*, 116 N.L.R.B. 1183 (1956), only three survive to this day. As employers depart, others enter the industry to take their place.

A multiemployer bargaining format is the only effective method for negotiating labor contracts in the longshore industry. The employers need to band together as a defense against potential union whipsawing tactics. By the same token, multiemployer bargaining is essential for longshore employees as well, to prevent their employers from playing one port off against another. After all, ships are essentially movable plants which can be dispatched to those ports offering better economic packages. Moreover, without multiemployer bargaining pension, healthcare, welfare, and other employee benefits would likely be unavailable. The peripatetic, part-time nature of longshore employment with limited service for each individual employer would prevent employees from having adequate service credit to qualify for coverage under any single employer plan. So, too, individual employers would not have the economic wherewithal to offer benefit packages comparable to those that can be furnished by multiemployer plans.[16]

Allowing antitrust law to come into play in multiemployer collective bargaining would engender Kafkaesque consequences. If, as petitioners advocate, the demise of the labor exemption is coterminous with the expiration of the prior collective bargaining agreement, the employer-members of a multiemployer group would face the prospect of antitrust liability from the get-go for

[16] Multiemployer and multiport benefit plans with aggregate assets totaling in the billions of dollars prevail in the longshore industry in the United States.

doing that which federal labor law mandates — continuing in effect the terms of the expired contract. The formulation proposed by the United States, which would allow the exemption to linger on until impasse, fares no better. In a national emergency, after impasse has already occurred, the members of a multiemployer bargaining group would be exposed to antitrust liability for composing the last offer the Taft-Hartley Act demands.[17] Even in the absence of a national emergency, a multiemployer lockout at impasse could be challenged as an anticompetitive "group boycott" and, as in this case, post-impasse implementation of employment terms encompassed within pre-impasse proposals as unlawful "price fixing." If the formulation advanced by petitioners and their *amici* supporters were to prevail, what labor law requires or permits, *see Katz*, 369 U.S. at 743 (pre-impasse maintenance of prior contract's terms required); *Buffalo Linen*, 353 U.S. at 95-96 (lockout permissible); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (same); *Laborers Health*, 484 U.S. at 543 n.5 (post-impasse unilateral changes permissible), antitrust law would taketh away.

Inviting antitrust law to the bargaining table would sound the death knell of multiemployer bargaining.[18] The practical

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[17] The national emergency provisions of the Taft-Hartley Act, 29 U.S.C. §§ 171-183 (1994), require employers to formulate unilaterally a last offer to be presented by the NLRB to the striking employees for secret ballot vote to facilitate settlement. *See* 29 U.S.C. §§ 179, 180 (1994).

[18] Petitioners predict that the absence of the labor exemption for post-impasse implementation of employment terms by employer associations is unlikely to spawn antitrust challenges in more traditional multiemployer bargaining units because of the acceptance by both sides of the legitimacy of common terms for all employees. *See* Petitioners' Brief at 39. This allegation is not supported by any fact or authority, and the alleged reason given is a *non-sequitur*. It is unlikely that labor unions would forego the opportunity to use the antitrust weapon to improve their bargaining leverage to obtain better terms, even if they are to be common employment terms. The absence of antitrust challenges in the past is indicative not of unions' timidity but rather of their recognition that multiemployer collective bargaining activities are exempt from the antitrust laws. Certainly, any acceptance of

consequences would be devastating. Heightened union intransigence at the multiemployer bargaining table would not be unexpected, since the inevitable impasse would trigger antitrust remedies that would shift the balance of bargaining power decidedly in labor's favor. Employers would be reluctant to establish multiemployer bargaining units in the first place if they know that doing so would inevitably result in their exposure to antitrust liability. Ocean carriers, which are usually not the longshore workers' common law employers, acquire employer status and its concomitant obligations by virtue of their participation in multiemployer collective bargaining and their assumption of the obligation to contribute to multiemployer longshore employee benefit plans. *See, e.g., Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989); *Philippines, Micronesia & Orient Navigation Co. v. NYSA-ILA Pension Trust Fund*, 909 F.2d 39 (2d Cir.), *cert. denied*, 498 U.S. 983 (1990). Their withdrawal from multiemployer bargaining would undermine the financial stability of many longshore employee benefit plans.

The intrusion of antitrust law into the bargaining arena would also have a destabilizing impact upon the authority of both bargaining agents. Any employer-member of the multiemployer group who disagrees with a post-impasse bargaining proposal could repair to an antitrust court to challenge the proposal. A disgruntled employee or dissident faction within the union would have similar leverage to upset the bargaining process. An industry, like the longshore industry, with hundreds of employers and thousands of employees is a fertile ground of potential litigants.

The suggestion of petitioners and the United States that antitrust law is not disruptive because the employers at impasse could individually implement unilateral terms or negotiate

petitioners' narrow exemption would generate either significant numbers of antitrust suits or litigation threats designed to coerce concessions employers would not otherwise make.

individual interim agreements, *see* Petitioners' Brief at 40; *Amicus* Brief of United States at 17-18, is as unrealistic as "extracting sunbeams out of cucumbers." JONATHAN SWIFT, GULLIVER'S TRAVELS, A VOYAGE TO LAPUTA, ch. 5 (1726), *reprinted in* THE COMPLETE WORKS OF JONATHAN SWIFT, at 186 (Roslyn, New York: Black's Readers Service, 1932). Interim agreements in the longshore industry would number in the hundreds, and any variations in contribution rates or benefit levels would seriously impair the administration and actuarial soundness of existing multiemployer employee benefit plans. Employers acting individually in unilaterally implementing employment terms are constrained under labor law to conform the terms to pre-impasse proposals, all of which were the product of multiemployer collaboration. The employers, even though acting individually, would still run the risk of antitrust claims based on allegedly consciously parallel action if their offers mirrored, as they must, pre-impasse proposals. Thus, the antitrust sword would still hang over the heads of the employers even were they to act individually. With the multiemployer unit fragmented, individual employers would be ripe for union whipsawing with any defensive multiemployer lockout also open to antitrust challenge as a group boycott. Under these circumstances the inevitable result would be employer capitulation — hardly the give and take of collective bargaining intended by Congress. *National Basketball Ass'n v. Williams*, 45 F.3d 684, 693 (2d Cir. 1995), *petition for cert. pending*, No. 95-137 (U.S. filed July 24, 1995).

What is particularly mischievous about the formulation advocated by petitioners and their *amici* colleagues is the lack of any compelling antitrust interests that it would advance. Collective bargaining is confined to employment terms in the labor market and raises no threat of any untoward anticompetitive restraint on the employers' product market. Neither petitioners nor any of their *amici*, including the United States, would condemn the challenged fixed salary for developmental squad players if it had received the union's approbation. Indeed, before the

court of appeals petitioners conceded that the fixed salary had no effect on the business market of professional football. *See Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 & n.8 (D.C. Cir. 1995). Absent genuine antitrust considerations all that remains is the use of the antitrust law as a cat's-paw to tinker with settled labor law regulation of the bargaining process to enhance the bargaining leverage of unions or of segments of unionized bargaining units. It is no wonder, then, that the court of appeals in this case and every other court of appeals that has confronted petitioners' formulation has rejected it.[19]

The rule of decision of the court of appeals in this case, whether tested against the explicit provisions of the statutory labor exemption or against the settled principles of the "nonstatutory" labor exemption, is a valid statement of the controlling law: collective bargaining activities of multiemployer groups that are lawful under federal labor law and that affect only employment conditions in the immediate bargaining unit are exempt from challenge under the antitrust laws at all stages of the collective bargaining process. *See Bonanno Linen*, 454 U.S. at 412 ("As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'"). This rule of law properly promotes national labor policy without frustrating national antitrust policy and preserves the continued viability of multiemployer bargaining in the United States.

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[19] *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995); *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. pending*, No. 95-137 (U.S. filed July 24, 1995); *Powell v. National Football League ("Powell II")*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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